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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-93

THE AMERICAN OIL COMPANY, *et al.*,
Petitioners,

against

CITY OF PHILADELPHIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS, YELLOW CAB COMPANY OF PHILADELPHIA, *ET AL.*, IN OPPOSITION

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Questions Presented

Should the Court consider:

1. Whether or not the United States Court of Appeals was correct in its dismissal of the petitioners' appeal on the ground that they lacked standing in the United

States Government civil antitrust action to contest an order requiring the Government to make available certain transcripts of grand jury testimony to the treble damage plaintiffs in another action where (a) the property in question belonged to the Court and not to the defendants in the Government's civil action; (b) the Government civil action had previously terminated by a consent decree and the grand jury proceedings and Government criminal action against the same defendants had long since terminated; and (c) the defendants in the Government civil and criminal actions had previously obtained access to the same grand jury transcripts and had freely disseminated such grand jury testimony among themselves?

2. Whether or not the United States District Court committed a manifest abuse of discretion by entering an order in the United States Government civil action granting plaintiffs and defendants in the treble damage actions access to certain grand jury transcripts where (a) the defendants had previously sought and obtained the same transcripts through court order; (b) the defendants had freely circulated among themselves the contents of the witnesses' testimony before the grand jury; (c) the grand jury proceedings and the Government criminal and civil actions had long since terminated; and (d) the Government did not object to such portion of the order provided particularized need was shown and where the Government expressly stated that it took no position as to what would constitute particularized need in this case? This issue was not determined by the Court of Appeals below.

Preliminary Statement

This brief is submitted on behalf of respondents, YELLOW CAB COMPANY OF PHILADELPHIA, YELLOW CAB CO. OF CAMDEN and YELLOW LIMOUSINE SERVICE, INC., in opposition to the above petition for a writ of certiorari.

The Yellow Cab respondents are plaintiffs in Civil Action No. 98-70, one of the treble damage cases against petitioners herein pending in the United States District Court, District of New Jersey, charging price fixing with respect to gasoline.

As will be set forth more fully later in this brief, there do not exist special or important reasons for the granting of the relief sought by petitioners herein because:

(1) the holding by the United States Circuit Court of Appeals below that petitioners lacked standing before the District Court to contest the private plaintiffs' application is not erroneous nor does it depart from decisions of this Court or other federal courts; and

(2) the decision of the District Court granting private plaintiffs access to certain grand jury testimony does not constitute an abuse of discretion and is in accord with past decisions of this and other federal courts.

At the outset, it should be noted that the petitioners have captioned this proceeding as "The American Oil Company, et al. v. City of Philadelphia, et al." That caption appears to refer to one of the private treble damage

actions pending in the United States District Court for the District of New Jersey. However, the order which is the subject of the present petition was entered in a civil antitrust injunction action brought by the United States Government, captioned "United States of America v. The American Oil Company, et al." Civil Action No. 370-65. The appeal to the United States Court of Appeals for the Third Circuit, to which the instant petition is directed, also bore the caption of the United States civil action.

The first of the private treble damage actions was commenced in November 1967. As a result of the pendency of the United States Government criminal actions, the private actions were suspended for approximately two years. On October 15, 1971, Judge Augelli of the U.S. Distict Court, District of New Jersey, issued the order in the Government civil action which is the subject of the instant petition, granting the plaintiffs in the private treble damage actions access to a portion of the transcripts sought by them of testimony given before the grand jury by employees and former employees of the private defendants. The use of the transcripts was limited to the treble damage actions and the order provided that all information be kept confidential. Judge Augelli denied the treble damage plaintiffs access to those grand jury transcripts which the defendants had not been permitted to inspect during the course of the criminal proceedings.

As set forth more fully below, prior to Judge Augelli's decision, the same transcripts in issue here had been examined by the defendants, and their contents were freely disseminated among all of the treble damage defendants through counsel. Thus, the grand jury transcripts, the secrecy of which petitioners claim should remain inviolate,

have already become the subject of wholesale disclosure as a direct result of petitioners' own acts.

In granting the private plaintiffs access to grand jury transcripts, Judge Augelli made an express finding of particularized need based upon the aforesaid prior disclosure of the grand jury testimony by the defendants, the time that had elapsed since the grand jury proceedings and since the prior events which were the subject of the grand jury testimony, and the failure of the grand jury witnesses to recall either the events or their testimony, which was acknowledged by the witnesses themselves in sworn affidavits.

It has been a year since Judge Augelli entered the order which is the subject of the instant petition. As a result of an unsuccessful appeal to the United States Court of Appeals for the Second Circuit and a motion for reargument of the Court of Appeals decision, which was also denied, plaintiffs still have not obtained access to the transcripts as ordered by Judge Augelli over a year ago. In the interim, discovery has come to a standstill. It is respectfully submitted that there exists no reason to further delay the expeditious disposition of this litigation.

Counter-Statement

There are four private treble damage actions pending in the United States District Court for the District of New Jersey against the eight defendant oil companies, the petitioners herein, and four additional oil companies.*

* The petitioners are The American Oil Company, Atlantic Richfield Company, Cities Service Oil Company, Cities Service Company, Gulf Oil Corporation, Humble Oil and Refining Company, Sinclair Refining Company and Socony Mobil Oil Company. Each of the petitioners are defendants in treble damage actions. In addition, the following corporations are named as defendants in those actions: Chevron Oil Co., Getty Oil Co., Sun Oil Co. and Texaco, Inc.

The first private treble damage action, following civil and criminal antitrust actions instituted by the United States in October 1965, was instituted by the City of Philadelphia in 1967. Subsequently, similar treble damage actions were instituted by the State of New Jersey, McCloskey and Company and Yellow Cab Company of Philadelphia.*

By decision filed on July 13, 1971, Judge Augelli, then Chief Judge of the United States District Court for the District of New Jersey, confirmed three separate classes of plaintiffs in the private treble damage actions. The Yellow Cab respondents were confirmed as representatives of the taxicab-limousine class (*City of Philadelphia* v. *American Oil Company,* CCH Trade Cases ¶73,625 (D.N.J. 1971)). The City of Philadelphia and State of New Jersey were confirmed as representatives of a class of public body purchasers of gasoline and the McCloskey Company was confirmed as representative of the class of non-public purchasers of gasoline in tank wagon quantities.

Subsequently, the Yellow Cab plaintiffs as well as the other plaintiffs in the treble damage actions moved to intervene to oppose the entry of the consent decree with respect to the Government's instant civil action against the petitioners herein. As part of those proceedings, the treble damage plaintiffs sought access to the transcripts of *all* witnesses who had testified before the grand jury. By order entered October 15, 1971, which is the subject of the instant appeal, Judge Augelli granted the treble damage

* The private actions, all pending in the New Jersey federal court, are City of Philadelphia v. The American Oil Co., Civ. No. 647-68; State of New Jersey v. The American Oil Co., Civ. No. 90-69; McCloskey & Co. v. The Amercian Oil Co., Civ. No. 47-70, and Yellow Cab Company v. The American Oil Co., Civ. No. 98-70.

plaintiffs access to certain of the grand jury transcripts, limiting disclosure to those transcripts of thirty-six employees and former employees of the treble damage defendants which had previously been examined by the defendants. The order was directed to the Government, not to the petitioners herein, and was not directed to any property or thing in which the petitioners had any proprietary right. Moreover, Judge Augelli's order was entered well after the grand jury proceedings and the Government's criminal and civil actions had terminated. In its brief dated August 20, 1971, with respect to the application of the treble damage plaintiffs, the Government did not oppose the private plaintiffs' request for access to grand jury transcripts provided that "particularized need" was shown. The Government specifically stated that it "* * * takes no position on what a 'particularized need' would be * * *." The Government has not appealed from Judge Augelli's order.

Prior to the private plaintiffs' motion and during the course of the criminal proceedings, the defendants (petitioners herein) sought an order to permit them to examine the transcripts of testimony of over 50 of their employees and ex-employees who had testified before the grand jury. In support of their motion defendants submitted affidavits of 34 of their employees who stated they could not recall their grand jury testimony. Copies of five such affidavits are annexed hereto as Appendix A. All of the affidavits submitted on behalf of the defendants are substantially identical to the affidavits annexed hereto and have been deleted only because of redundancy.

The Court granted defendants' motion to the extent that it gave defendants access to the identical transcripts which Judge Augelli later made accessible to the parties in the treble damage actions, holding:

> "The Rules pertaining to discovery and disclosure usually leave sufficient latitude in the exercise of discretion to prevent or correct abuses. There remain, no doubt, instances where the ends of Justice require that the secrecy of Grand Jury testimony remain inviolate * * * *no such showing has been made in this case.*" *United States* v. *American Oil Company,* 286 F.Supp. 742 (D. N.J. 1968) [Emphasis added].

Following that decision the defendants inspected all of the transcripts of the testimony of their own employees to which they were given access. In addition, counsel for the defendants had previously conducted interviews of and prepared recall statements for the grand jury witnesses immediately after the latter had given testimony. Thereafter, counsel for the various defendants inspected recall statements of grand jury witnesses employed by the other defendants and made summaries of such recall statements.*

* Various of the defendants acknowledged this free flow of grand jury testimony information in their respective answers to plantiffs' interrogatories in the treble damage actions. For example, in answer to Interrogatory No. 1, Set No. 1, filed in the private treble damage action, defendant Atlantic Richfield stated:

> "(b) During the period covered by this interrogatory the Company did not obtain summaries of any grand jury transcripts; counsel* for the Company did, however, interview the above named witnesses called by the grand jury and prepared recall statements for each such witness; the precise dates of the statements are unknown, but generally the interviews were conducted

Thus, the defendants not only have had access to the grand jury testimony of their own employees and former employees, but, in addition, have detailed knowledge as to testimony of other defendants' employees and former employees. Under the circumstances, it is respectfully submitted that grand jury secrecy is not a consideration in these proceedings.

ARGUMENT

POINT I

The decision of the United States Circuit Court of Appeals below dismissing the appeal by reason of petitioners' lack of standing was correct and does not depart from nor conflict with the decisions of this Court or other federal courts.

In its *per curiam* decision, dismissing petitioners' appeal below, the Court of Appeals held:

"We think the appealability issue is not free from substantial doubt. However, we entertain no such

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on the same day the witness appeared before the grand jury. [Footnote omitted.]

* * *

"(In addition, counsel for certain of the defendants inspected certain of the recall statements of grand jury witnesses employed by other defendants and made summaries thereof. Information responsive to this interrogatory with respect to interviews of individuals employed by other defendants is being furnished by each such defendant. Accordingly, it would be unnecessarily duplicate to attempt to supply such information here.)"

A copy of the foregoing interrogatory answer is annexed as Appendix B.

A substantially similar answer was given by defendant Sinclair Refining Company in its answer to Interrogatory No. 1.

doubt as to the standing issue. When the order was entered in this action the grand jury proceedings involved had terminated. Also final judgment had been granted in the criminal proceedings and a consent final decree entered in the government's civil action. Furthermore, the order to produce was not directed to the defendants. In these circumstances at least, we fail to see how the defendants had standing to oppose the application. The government's right in such a situation is not before us."

It is a basic requirement of standing at any stage of a legal proceeding that the party must have an *interest* in the subject matter of the dispute. As the Court stated in *National Missile and Electronics, Inc.*, 326 F.2d 401 (9th Cir. 1964), quoting from *Hamilton Trust Co.* v. *Cornucopia Mines Co.*, 9th Cir., 223 F. 494:

> "It is a fundamental rule of appellate jurisdiction that every person desiring to appeal from a decree must be interested in the subject-matter of the litigation, and the interest must be immediate and pecuniary and not a remote consequence of the judgment. The interest must be substantial, and a merely nominal party to an action cannot appeal. The interest must also be subsisting, for although a party may have an appealable interest at the commencement of the suit, if that interest has terminated before the entry of the judgment or decree sought to be appealed from, he cannot appeal. Again, the right or title which the appellant seeks to establish must be his own and not that of a third person. * * *" (326 F.2d at page 402)

The petitioners' lack of interest in the subject matter of the order of the District Court below is apparent from the following:

1. The order was not directed against any property of petitioners, nor did it require them to take or refrain from taking any action. Rather, the property in question, grand jury transcripts, belong to the Court. The United States Government, which has the greatest interest in the secrecy of grand jury proceedings, has not appealed from the District Court's decision. Since the defendants have no proprietary interest either in the transcripts themselves or the testimony which was heard by the grand jury, they lack standing in the U.S. Government proceedings to contest an order which would make the property in question available in the treble damage actions. *Donaldson* v. *United States,* 400 U.S. 517 (1971); *Alderman* v. *United States,* 394 U.S. 165 (1969).

2. The order of the District Court does not affect any interest of the petitioners in the Government's civil action in which it was entered, nor in the criminal proceedings against petitioners. The civil action terminated by a consent decree entered August 12, 1971. The grand jury proceedings had long ceased and all of the criminal actions against the petitioners had previously ended by their filing pleas of *nolo contendere.* Thus, any interest that the petitioners may have had in the subject of the order in those proceedings had long since terminated.

3. The sole interest claimed by the petitioners is that of secrecy with respect to testimony given by their employees and former employees before the grand jury. It is clear that this purported interest is not pecuniary; nor is it substantial in view of the fact that the petitioners themselves have already destroyed any secrecy by acquiring and

disseminating among themselves the very testimony which they now seek to suppress.

Petitioners have cited no decisions rendered by this Court or any other court with respect to the issue of standing which conflict with the decision of the Court of Appeals below. In none of the cases involving grand jury disclosure cited by the petitioners in Point II of their brief was the issue of standing raised or decided. In fact, where the issue was raised in a proceeding in which treble damage plaintiffs were granted access to grand jury records, the Court of Appeals held that private defendants lacked standing to contest the disclosure. *Nairn* v. *Clary,* 312 F.2d 748 (3rd Cir. 1963).

Petitioners' reliance on *Sierra Club* v. *Morton,* 40 U.S. L.W. 4397 (Apr. 19, 1972) at page 16 of their brief is ill-founded. There, the Court declined to grant standing to the petitioner in a proceeding attacking the action of an administrative agency. While recognizing that the type of injury sufficient to create standing *where statutes authorize review of federal agency actions* has been somewhat expanded, the Court made clear, even in those cases:

> "But broadening the categories or injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury." (40 U.S.L.W. at p. 4401)

The instant proceeding does not involve a federal agency, nor a constitutional question and there has been no deviation by this Court from the traditional requirements that direct, substantial and economic interests must be af-

fected for standing to exist in other types of cases, such as the instant proceeding. Moreover, even under the somewhat broader concepts of standing applied in administrative agency proceedings or where constitutional questions are presented, "the party seeking review must have himself suffered an injury" as the Court stated in *Sierra Club* v. *Morton, supra.* The only harm that could result to petitioners by virtue of the District Court's order below is that the treble damage plaintiffs will be given access to the same information which the petitioners had previously obtained. Such a result cannot constitute the required "injury" upon which to predicate standing, nor have petitioners cited a single case in which standing was permitted on such a tenuous ground.

Finally, if error was committed by the District Court below, which it was not, or if the use of the grand jury transcripts is objected to by the petitioners at some point in the treble damage proceedings, the petitioners will be free to seek redress at the appropriate time. A one-year delay in these proceedings has already occurred as a result of petitioners' appeal, motion for reargument and the instant petition. It is respectfully submitted that petitioners have shown no reason to further delay these proceedings by piecemeal litigation.

POINT II

The District Court did not abuse its discretion in granting the treble damage plaintiffs access to a portion of the grand jury transcripts sought and to which petitioners had previously acquired access. Moreover, whether or not the District Court abused its discretion is not a sufficient basis for granting the writ of certiorari.

Having determined that petitioners' appeal should be dismissed on the ground that they lacked standing, the Court of Appeals did not pass upon the question as to whether or not the District Court erred in making available to the treble damage plaintiffs transcripts of grand jury testimony to which defendants themselves had previously obtained access from the same Court. It is respectfully submitted that the District Court committed neither an abuse of discretion nor, as the cases would require for reversal, "a manifest abuse of discretion." *Atlantic City Electric Company* v. *A. B. Chance Company,* 313 F.2d 431, 434 (2nd Cir. 1963); *Nairn* v. *Clary,* 312 F.2d 748 (3rd Cir. 1963); *In re Grand Jury Proceedings,* 309 F.2d 440 (3rd Cir. 1962).

Chief Judge Augelli found "particularized need" for the disclosure of grand jury testimony based upon the following factors:

1. "[The] transcripts relating to the minutes of the particular employees and officers of the defendants have been seen and made available to the defendants"; and

2. "A lot of time has elapsed in this case—many, many years. Some affidavits made by witnesses of the

defendants indicate a lapse of memory here or there, or no clear recollection of what happened." (Tr. of Hearing of Aug. 30, 1971, pp. 180-181, a copy of which is annexed hereto as Appendix C.)

Under the following circumstances, it is respectfully submitted that Chief Judge Augelli committed no such abuse or manifest abuse of discretion.

1. The treble damage defendants had already debriefed the same witnesses whose grand jury transcripts are the subject of this appeal and had freely circulated their debriefing statements to the other defendants.

2. The treble damage defendants had successfully obtained access to the transcripts in issue based upon affidavits of the grand jury witnesses who affirmed that they had little recollection of what their testimony had been before the grand jury.

3. In previously granting treble damage defendants access to the grand jury testimony of their employees and former employees, the Court expressly found that no grounds existed to retain the secrecy of the grand jury testimony at issue. *United States* v. *American Oil Company,* 286 F. Supp. 742, 753 (D. N.J. 1968).

4. The grand jury investigation began in 1963, and concerned events which commenced in 1955, some 16 years prior to the order which is the subject of the instant petition.

5. The criminal action which followed the grand jury investigation terminated in 1969, upon the plea by each of

the appellants of *nolo contendere,* and the civil action terminated pursuant to a consent decree in August of 1971.

6. Judge Augelli did not grant the parties access to *all* grand jury testimony sought by the treble damage plaintiffs. His order was limited only to the transcripts to which defendants had access. The Court's order specifically provided that the transcripts would be kept confidential.

Petitioners' entire argument on this issue is predicated upon their contention that "* * * proceedings before a grand jury are to be kept secret." (Petitioners' Brief, p. 8). Having successfully obtained a court order to breach that secrecy and having freely circulated that which they now claim to be "inviolate", petitioners have themselves destroyed the basis upon which they have predicated their argument. Petitioners' only complaint at this juncture of the proceedings is that the truth will be as freely accessible to the treble damage plaintiffs as it was to them.

There remains not a single policy reason which would be served by denying the treble damage plaintiffs the same information which petitioners had previously sought and obtained from the Court below. In fact, as set forth below, it is highly questionable as to whether or not Judge Augelli was required to find "particularized need." In any event, the Court made an express finding of particularized need which could not be considered a manifest abuse of discretion under the circumstances of this litigation.

The rule of grand jury secrecy is ancient. Originally intended as a protection for defendants, it became, in the last century, a protection for the prosecution. Calkins,

Grand Jury Secrecy, 63 Mich. Law Rev. 455 (1965). Every prosecutor and former prosecutor has an instinctive fear that any exceptions to the permanent secrecy of grand jury testimony will hamper prosecutions. The conflict between this feeling and the general trend towards full disclosure resulted in the enunciation of the standard of "particularized need", applicable when criminal defendants sought certain grand jury testimony. *United States* v. *Procter & Gamble Company,* 356 U.S. 677 (1958); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959); *Dennis* v. *United States,* 384 U.S. 855 (1966).

There are five reasons which form the current basis of grand jury secrecy. As classically formulated in *United States* v. *Amazon Industrial Chemical Corp.,* 55 F.2d 254, 261 (Dist. Md. 1931) and subsequently quoted in *United States* v. *Procter & Gamble Company,* 356 U.S. 677, 681, Note 6 (1958), they are:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no possibility of guilt."

When these reasons cease, the need for grand jury secrecy ceases. In fact, it has already been recognized by the courts and by Congress recently that in the situation where grand jury disclosure is most frequently sought, where a criminal defendant requests grand jury testimony of a trial witness, that there does not exist any requirement of "particularized need" because grand jury secrecy no longer serves the policies stated above.

Following the *Dennis* case, *supra,* the Court of Appeals for the Second Circuit held that when a witness has testified upon a criminal trial, the defendant was entitled to see his relevant grand jury testimony without any showing of "particularized need", *United States* v. *Youngblood,* 379 F.2d 365 (2d Cir. 1967). In *United States* v. *Youngblood, supra,* the Second Circuit expressly held that cases such as *United States* v. *Procter & Gamble Company, supra,* and *Pittsburgh Plate Glass Co.* v. *United States, supra*:

> "* * * merely indicate a minimum standard to which the courts must adhere, and do not limit the court's power to order disclosure in additional situations where a showing of particularized need has not been made." (379 F.2d at p. 369)*

In *Cargill* v. *United States,* 381 F.2d 849 (10th Cir. 1967), the Court of Appeals for the Tenth Circuit reached the same result by finding that "particularized need" was

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* In *Youngblood,* the Court held that if the Government opposes disclosure, it must show that such disclosure "would jeopardize national security" or a similar reason (*supra,* p. 370). In the instant case, the Government has not appealed and no one has even suggested that any interest, other than possibly the posture of the defendants in the treble damage action would be jeopardized by disclosure. See also *United States* v. *Hughes,* 413 F.2d 1244 (5th Cir. 1969), and *Harris* v. *United States,* 433 F.2d 1127 (D.C. Cir. 1970).

established simply by the witness having testified at trial and the defense's demand for the grand jury transcript. In 1970, Congress accepted these rulings and enacted them as an amendment to the Jencks Act, 18 U.S.C. Sec. 3500(e)(3), added by P.L. 91-452, Title I, Sec. 102, October 15, 1970, 84 Stat. 962. As a result of this amendment, a criminal defendant is now entitled to the relevant grand jury testimony of any trial witness, without any showing of "particularized need."

The American Bar Association's Project on Minimum Standards for Criminal Justice has gone still farther and recommended that in all cases, the grand jury testimony of the defendant and of all persons whom the prosecution intends to call as witnesses at the trial should be turned over to the defendant in advance of trial. *Standards Relating to Discovery and Procedure Before Trial,* Standard 2.1(a)(iii) and Commentary (1970).

Since the indictment here was handed down and the grand jury dismissed long ago, and both the criminal case and the Government's civil case have now been concluded, the first three of the traditional reasons are obviously inapplicable here.

All of the petitioners investigated by the grand jury were named defendants in the now concluded Government criminal and civil actions; accordingly, Reason No. 5 is therefore inapplicable, as well. The petitioners have pleaded *nolo contendere* to the criminal charges and have entered into a consent decree with respect to the Government's civil action.

Reason No. 4 is equally inapplicable. The "anti-intimidation" rationale, though frequently cited, is of little force when applied to the period after indictment and apprehension of the defendant. Any witness before a grand jury understands that he may be called upon to repeat his testimony at trial and that his secrecy can, at most, last until that point. The Government similarly knows that it may call upon any witness for such testimony, and it cannot and does not offer witnesses a promise of secrecy beyond the trial. In many jurisdictions, in fact, the witnesses' names must be released by the prosecution in advance of trial and the witnesses' identities do not remain secret much beyond the handing up of the indictment. It is for this reason that Wigmore, not generally known for his partiality to defendants, states that once the grand jury has ceased its function, the secrecy as to the witnesses' testimony should cease. 8 *Wigmore on Evidence,* §2362 (McNaughton Rev. 1961).

Whatever may be the general merit of the "anti-intimidation" rationale, it has no force in this case, now that both the Government's cases have been concluded. Moreover, the grand jury testimony in question is that of petitioners' own employees; the petitioners were the criminal defendants, and it was the petitioners themselves from whom intimidation was most to be feared. Their employees' testimony has already been turned over to the petitioners, the witnesses were questioned about their testimony by the petitioners and the results of those questionings were freely circulated among all of the treble damage defendants. In fact, those witnesses disclosed their testimony to defendants immediately after they had testified.

What possible fear of intimidation is left now? It was the possibility of retaliation and intimidation which the Supreme Court cited in *United States* v. *Procter & Gamble Company, supra,* 356 U.S. at 682, as the most dangerous possible consequence of disclosure. That case and its successors, which also deal with disclosure to *defendants,* are therefore inapplicable here. Moreover, the fact that defendants had invaded grand jury secrecy by debriefing of witnesses has been held to constitute sufficient reason to disclose grand jury transcripts to treble damage plaintiffs. *State of Illinois* v. *Harper & Row Publishers, Inc.,* 50 F.R.D. 37, 42 (E.D. Ill. N.D. 1969).

In short, there is no reason to withhold information which is no longer a secret from anyone in this litigation except the treble damage plaintiffs. The position of the petitioners, who themselves committed the most serious breach of the grand jury secrecy in this case, should carry no weight whatsoever.

Petitioners have cited not a single case in which the Court has denied disclosure of grand jury testimony to treble damage plaintiffs after it has been disclosed to the defendants themselves. Nevertheless, the petitioners suggest that the disclosure of grand jury testimony will only be appropriate when the witnesses testify on depositions that they don't remember their grand jury testimony or the events which preceded that testimony. In other words, petitioners would require that deposition witnesses repeat exactly that which they stated on affidavits in support of their motion in the criminal action to breach grand jury secrecy—that they don't remember.

Under the circumstances, it is respectfully submitted that there exists no basis whatsoever to require the parties and the Court to participate in an expensive and time-consuming procedure to establish the lack of memory which the witnesses have acknowledged. The law should and does provide a more functional approach to the ascertainment of the truth.

It is further submitted that, even in the absence of prior disclosure to the treble damage defendants, Judge Augelli would have properly exercised his discretion in granting treble damage plaintiffs access to a portion of all of the grand jury transcripts which were sought. Well before the adoption of the Jencks Act, the courts held that a demonstrated failure of memory was sufficient to release a deposition witness's prior grand jury testimony. *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2d Cir. 1963), application for stay denied, 372 U.S. 699 (1963); *Donald J. Nairn* v. *Clary*, 312 F.2d 748 (3d Cir. 1963); *Consolidated Edison Co. of New York, Inc.* v. *Allis-Chalmers Mfg. Co.*, 217 F.Supp. 36 (S.D.N.Y. 1963); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D. Ill. E.D. 1969); *Brenan R. Sellers*, 32 F.R.D. 473 (N.D. Ill. 1962).

In the criminal actions, the witnesses' lack of recall was the very basis upon which the petitioners herein had obtained access to grand jury transcripts. Thus, the witnesses' acknowledged lack of recollection of their grand jury testimony and of events which preceded that testimony furnishes sufficient "particularized need" even without regard to the fact that the petitioners have already ob-

tained access to that which they now seek to bar from treble damage plaintiffs.

Having obtained the grand jury testimony, and having debriefed grand jury witnesses and circulated such "secret" information among themselves, there can be absolutely no basis for petitioners to claim that Judge Augelli committed a manifest abuse of discretion in finding "particularized need", even if such a standard were required in the circumstances of this litigation.

Conclusion

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH CALDERON, Esq.
DAVID BLASBAND, Esq.
Attorneys for Respondents,
Yellow Cab Company of Philadelphia,
Yellow Cab Co. of Camden, and
Yellow Limousine Service, Inc.
110 East 59th Street
New York, N. Y. 10022

LINDEN AND DEUTSCH
Of Counsel

APPENDICES

Appendix A

Affidavit of Donald R. Beal

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, THE ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL COMPANY, CITIES SERVICE COMPANY, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, SINCLAIR REFINING COMPANY, and MOBIL OIL CORPORATION,

Defendants.

Commonwealth of Australia)
State of Victoria)
City of Melbourne) ss.:
Consulate General of the United)
States of America) ss.:

DONALD R. BEAL, being duly sworn, deposes and says:

1. On October 29, 1964, I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment against Mobil Oil Corporation ("Mobil") and others. I make this affidavit in support of a motion by Mobil for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period January 1, 1955 through April 8, 1965. Prior to 1957, I was employed by Mobil in various resale sales positions. None of these positions was in Pennsylvania, New Jersey

or Delaware. From 1957 through September 30, 1958, I was District Manager of Mobil's New Haven (Connecticut) Resale District; from October 1, 1958 through January 31, 1961, I was Resale Sales Manager of Mobil's Philadelphia Division; from February 1, 1961 through December 31, 1962, I was Division General Manager of Mobil's Philadelphia Division; from January 1, 1963 through March 31, 1966, I was Division General Manager of Mobil's West Coast Division.

3. I have little specific present recollection of my testimony before the grand jury more than three years ago. I do recall that I was shown several documents and was questioned about contacts and communications with representatives of other oil companies in Pennsylvania, New Jersey and Delaware in the period 1958 to 1963.

4. I have no objection to the disclosure of the record of my testimony to Mobil's counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, my testimony before the grand jury can be used to refresh my recollection. I am presently employed by a subsidiary of Mobil, Mobil Oil Australia Limited, and I make this affidavit voluntarily and without coercion.

/s/ Donald R. Beal

Donald R. Beal

Sworn to before me this
20th day of December, 1967.

/s/ John Q. White

John Q. White
Consul of the United States of America.
(Seal)

Appendix A

Affidavit of James B. Kelley

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, THE ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL COMPANY, CITIES SERVICE COMPANY, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, SINCLAIR REFINING COMPANY, and SOCONY MOBIL OIL CORPORATION,

Defendants.

State of Florida)
County of Pinellas) ss.:

JAMES B. KELLEY, being duly sworn, deposes and says:

1. On December 5, 1963 I testified under subpoena before a grand jury of this Court and I have been informed by counsel that this grand jury subsequently returned an indictment against Gulf Oil Corporation ("Gulf") and seven other oil companies. I make this affidavit in support of a motion by Gulf for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period from January 1, 1955 through April 8, 1965, during which period I held the following positions with Gulf:

a. From 1955 to December 31, 1958, Manager of Retail and Jobber Sales in the Philadelphia Sales Division, at Philadelphia, Pennsylvania.

b. From January 1, 1959 to December 31, 1959, Division Manager of the Philadelphia Sales Division, at Philadelphia, Pennsylvania.

c. From January 1, 1960 to July 31, 1960, Division Manager of the New York Sales Division, at New York City.

d. From August 1, 1960 to March 1964, Vice President for the Eastern Region, at Philadelphia, Pennsylvania.

e. From March 1964 to August 31, 1965, Regional Vice President located at Houston, Texas.

Retired from Gulf, effective August 31, 1965.

3. It has been over four years since I testified before the grand jury and I have at the present time only a general recollection of the matters on which I was questioned. I am unable to recall the details of my testimony at this time. I do recall that I was questioned about gasoline pricing policies of Gulf in the states of New Jersey, Pennsylvania and Delaware and in the course of my testimony I was shown some documents and questioned about many

sales transactions and communications between 1955 and 1963.

4. I do not object to the disclosure of the record of my testimony to Gulf's counsel for use in this case. Moreover, I request that such disclosure be ordered for the reason that in the event I should be a witness at the trial of this case my grand jury testimony can be used to refresh my recollection. I am not presently employed by Gulf, and I make this affidavit of my own free will and without any coercion.

/s/ James B. Kelley

James B. Kelley

Sworn to before me this
22 day of December, 1967.

Joan M. Brown
Pinellas County
State of Florida

Appendix A

Affidavit of Albert F. Spangenberg

Privileged and confidential for use only by defendants' counsel in the captioned action.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, *et al.*,
Defendants.

State of Maryland)
County of Baltimore) ss.:

ALBERT F. SPANGENBERG, being duly sworn, deposes and says:

1. My most recent position with Humble Oil & Refining Company ("Humble") was operations coordinator, Eastern Esso Region. I retired in July, 1966. On June 4, 1964 I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment against Humble and others. I make this affi-

davit in support of a motion by Humble for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period January 1, 1955 through April 8, 1965. During that time I occupied the following positions with Humble and its predecessor corporation:

	Title	*Geographic Location*
1/1/55	Assistant to Operations Manager	Philadelphia, Pa.
2/1/55	District Manager	Philadelphia, Pa.
8/20/56	Merchandising Manager (Acting)	Bala-Cynwyd, Pa.
9/10/56	District Manager	Philadelphia, Pa.
3/1/57	Operations Manager (Rot. Assign.)	Del.-Md.-D.C. Div.
8/1/57	District Manager	Philadelphia, Pa.
6/17/60	District Manager (Spec. Assign.)	Philadelphia, Pa.
8/15/60	District Manager	Philadelphia, Pa.
11/1/62	Service Station Sales Mgr. (Rot. Assign.)	Bala-Cynwyd, Pa.
6/3/63	Marketing Manager—Pennsylvania	Baltimore Area, Baltimore, Md.

3. I have little specific present recollection of my testimony before the grand jury three and one-half years ago.

I do recall that I was questioned about many meetings, communications and events which were alleged to have occurred between 1955 and 1962. The questions related to sales of gasoline in Pennsylvania, New Jersey and Delaware.

4. I have no objection to the disclosure of the transcript of my testimony to Humble's counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, such testimony can be used to refresh my recollection. I make this affidavit voluntarily and without inducement or coercion.

/s/ Albert F. Spangenberg

Albert F. Spangenberg

Sworn to before me this
21st day of December, 1967.

My Commission Expires July 1, 1967

Appendix A

Affidavit of Fred C. Bowman

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE OIL COMPANY, CITIES SERVICE COMPANY, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, SINCLAIR REFINING COMPANY, and SOCONY MOBIL OIL CORPORATION,

Defendants.

Commonwealth of Pennsylvania)
County of Philadelphia) ss.:

FRED C. BOWMAN, being duly sworn, deposes and says:

1. On October 29, 1964, I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment against The Atlantic Refining Company (now Atlantic Richfield Company, hereinafter referred to as "Atlantic Richfield") and others. I make this affidavit in support of a motion by Atlantic Richfield for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period from January 1, 1955 through April 8, 1965. From December 16, 1953 to February 1, 1956, I was General Sales Manager of Atlantic's Brazilian subsidiary—Atlantic Refining Company of Brazil; from February 1, 1956 to October 6, 1958, I was Manager National Accounts and Commercial Sales for Atlantic Richfield; from October 6, 1958 to March 1, 1959, I was Manager, Wholesale Marketing of the Eastern Pennsylvania Sales Group for Atlantic Richfield; from March 1, 1959 to January 27, 1964, I was District Manager, Wilmington District for Atlantic Richfield; and from January 27, 1964, I was Wholesale Marketing Manager, Central Region, for Atlantic Richfield.

3. I have no specific recollection of my testimony before the grand jury. I do recall that I was questioned about transactions and communications which occurred between 1955 and 1962. The questions related to sales of gasoline in Pennsylvania, New Jersey, and Delaware.

4. I have no objection to the disclosure of the record of my testimony to Atlantic Richfield's counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, it can be used to refresh my recollection. I make this affidavit voluntarily and without coercion.

/s/ Fred C. Bowman

Fred C. Bowman

Sworn to before me this
18 day of December, 1967.

Notary Public
Philadelphia County
My Commission Expires March 4, 1968

Appendix A

Affidavit of Walter S. Hine

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, THE ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL COMPANY, CITIES SERVICE COMPANY, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, SINCLAIR REFINING COMPANY, and SOCONY MOBIL OIL CORPORATION,

Defendants.

State of New Jersey)
County of Gloucester) ss.:

WALTER S. HINE, being duly sworn, deposes and says:

1. On November 12, 1963, I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment against Cities Service Oil Company ("Cities") and others. I make this affidavit in support of a motion by Cities for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period January 1, 1955, through April 8, 1965. From 1955 to May 15, 1961, I held several managerial positions in Cities' Philadelphia Division, and had responsibility for sales in southern New Jersey, Greater Philadelphia and Delaware. I resigned from Cities on May 15, 1961. Since May 15, 1961, I have been Vice President of Consumers Oil Service Inc., Paulsboro, New Jersey. Consumers Oil is a distributor of Cities' products, and approximately one-third of its stock is owned by Cities.

3. I have little specific present recollection of my testimony before the grand jury more than four years ago. I do recall that I was questioned about many sales transactions and communications which occurred between 1956 and 1961. The questions related to sales of gasoline in Pennsylvania and New Jersey.

4. I have no objection to the disclosure of the record of my testimony to Cities' counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, it can be used to refresh my recollection. I am not presently employed by Cities, and I make this affidavit voluntarily and without coercion.

/s/ WALTER S. HINE

Walter S. Hine

Sworn to before me this
day of December, 1967.

(Signature illegible)

Appendix B

Answer of Defendant Atlantic Richfield to Plaintiffs' Interrogatory 1, Set 1

* * *

(b) During the period covered by this interrogatory the Company did not obtain summaries of any grand jury transcripts; counsel* for the Company did, however, interview the above named witnesses called by the grand jury and prepared recall statements for each such witness; the precise dates of the statements are unknown, but generally the interviews were conducted on the same day the witness appeared before the grand jury.

(c) Counsel for the Company.

(d), (e), (f) & (g) Two copies of the recall statements are presently in the possession of counsel.

(In addition, counsel for certain of the defendants inspected certain of the recall statements of grand jury witnesses employed by other defendants and made summaries thereof. Information responsive to this interrogatory with respect to interviews of individuals employed by other defendants is being furnished by each such defendant. Accordingly it would be unnecessarily duplicative to attempt to supply such information here.)

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* The firm of Hughes Hubbard & Reed has been counsel for the Company in the above captioned cases since July 17, 1967. Prior to that date counsel for the Company in these cases was the firm of Howrey Simon Baker & Murchison, 1707 H Street, N.W., Washington, D.C. References to "counsel" hereinafter shall include counsel for the Company at the time in question and/or counsel employed in the Company's legal department.

Appendix C

Transcript of Hearing Held on August 30, 1971 (pp. 180-181)

* * *

[Page 180]

[THE COURT:] "Now we come to the big fellow—H [Grand Jury Transcripts]. That's the big one.

"A lot of time has elapsed in this case—many, many years. Some affidavits made by witnesses of the defendants indicate a lapse of memory here or there, or no clear recollection of what happened. And, in all fairness, it would have to be an extraordinary memory that could recall today what happened years ago.

"In addition to the lapse of time, we have another factor here which I think is important. And that is that those transcripts relating to the minutes of particular employees and officers of the defendants

* * *

[Page 181]

have been seen and made available to the defendants.

"I think if you combine those two things—lapse of time plus the fact that they have already been seen by the defendants—that makes out, in my opinion, a sufficient reason for making them available also to the treble damage plaintiffs. That's enough particularized need for me.

"So you will have access to the transcripts that defendants saw, or those which were made available to them. As to the others—no. However, you always have the right to come back and show a particularized need to get those transcripts.

"Now, I am going to give you a bonus. The Government has said it will make known the names of all those who testified before the grand jury. I will say that those names should be made available not only to the treble damage plaintiffs, but at the same time to the defendants.

"I think that takes care of everything."

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